A

TAN HAN HUA & ANOR

v.

ARULARASU BALAKRISHNAN & ORS

B

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CIVIL SUIT NO: 22-72-2005]
24 DECEMBER 2009

C ***TORT:*** *Conspiracy - Wrongdoings - Allegation of - Whether 3rd defendant conspiring with 1st and 2nd defendants in alleged wrongdoings - Whether 3rd defendant, being the servant or agent of the 4th, 5th and 6th defendants had conspired with 1st and 2nd defendants and proceeded to arrest the plaintiffs without carrying any proper investigation - Whether*
D *the 4th, 5th and 6th defendants have allowed themselves to be used by the 1st and 2nd defendants to exert pressure on the plaintiffs to settle a civil debt - No evidence adduced by plaintiffs to support the allegations - Whether plaintiffs failed to discharge burden on them*

E ***CRIMINAL PROCEDURE:*** *Police investigation - Police report - Whether 1st defendant has the right and basis to lodge the police report - Report lodged only after third cheque was also dishonoured - Whether there was real basis for 1st defendant to lodge the report that his company was being cheated*

F ***CRIMINAL PROCEDURE:*** *Arrest - Remand order - Validity of the arrest - Whether arrest by 3rd defendant unlawful, illegal and capricious - There was a reasonable suspicion on 3rd defendant's part that both the plaintiffs had committed the offence complained of by the 1st defendant - Plaintiffs' arrest was proper and lawful in the circumstances - Validity of*
G *the remand - Whether remand was lawfully passed by the magistrate - Whether warrant of remand wrongly granted or totally unconstitutional in the absence of any evidence to the contrary*

The 1st defendant was the manager of the 2nd defendant in 2004.
H The 2nd defendant was in the business of operating premix plants and selling premix concrete. Tan Chin Hin (the late 1st plaintiff) died in 2008. He was the father of the 2nd plaintiff who was the sole proprietor of Syarikat Lian Chen Engineering Works (LCEW). He was also the father of Tan Han Tiong who was then running
I Syarikat Perniagaan Hanlink (PHL). PHL was a customer of the 2nd defendant in 2004. The 2nd defendant had sold premix to PHL. PHL paid for the premix *via* 2 Maybank cheques no. 116108

for RM17,000 ("the first cheque") and no. 096496 for RM36,000 ("the second cheque"). The late 1st plaintiff passed these two cheques to the 2nd defendant. Both these cheques were dishonoured upon presentation. Upon inquiry by the 1st defendant, another Maybank cheque no. 070312 for the sum of RM17,000 ("the third cheque") issued by LCEW was later given to the 2nd defendant through the late 1st plaintiff. This third cheque was also dishonoured with the remarks "stopped payment". The 1st defendant lodged a police report on 1 October 2004. The 3rd defendant, DW2 commenced investigation pursuant to the said report. He arrested the late 1st plaintiff on 22 March 2005. The 2nd plaintiff was arrested by C/Insp Mohamad bin Taliti. Both the plaintiffs were remanded for six days and subsequently charged under s. 420 of the Penal Code. The case was still pending. The plaintiffs maintained there was no basis for the 1st defendant to lodge the police report and that the police report was a false report and pursuant thereto their subsequent arrest and remand were baseless and therefore unlawful. The plaintiffs sought a declaration against all the defendants that *inter alia*, their arrest and remand were unlawful and unconstitutional; damages for wrongful arrest and detention; exemplary and aggravated damages; costs and interest.

Held (dismissing the plaintiffs' application with costs):

(1) The plaintiffs had failed to discharge the burden that the 4th, 5th and 6th defendants have allowed themselves to be used by the 1st and 2nd defendants and that the 3rd defendant had conspired with them. No evidence was adduced by the plaintiffs to support the allegations. Evidence Act 1950, ss. 101, 102; *Chandrasekaran & Ors v. PP* (refd); *Nanyang Development Sdn Bhd v. How Swee Poh* (refd); *Lim Soh Meng & Anor v. Krishnan* (refd). (paras 9 & 10)

(2) It was only reasonable to expect the 1st defendant to question the intention of the parties or whoever it was who submitted the third cheque to the 2nd defendant and to opine that the 2nd defendant was being cheated under the circumstances. The third cheque was a replacement of the second cheque. As the beneficiary of these cheques, the first/second defendant had a valid expectation in law that they would be paid through these cheques. Since all three cheques in favour of the 2nd defendant through the late 1st plaintiff were dishonoured, the natural course of action for the 1st defendant in such circumstances

was to lodge a police report. There was a real basis for the 1st defendant to lodge the police report that his company was being cheated and it was not a false report. (paras 11, 12 & 13)

(3) The issues raised by the plaintiffs were issues of evidence to be deliberated and evaluated at the plaintiffs' criminal trial. The court here was only concerned with the propriety of the 3rd defendant's action in arresting both the plaintiffs considering the allegations levelled against him. The 3rd defendant's act in arresting both the plaintiffs was well within the law. He harboured reasonable suspicion that both the plaintiffs and Tan Han Hong were all involved in the issuance of the dishonoured cheques. He had acted reasonably in pursuing with his investigations and thereafter arresting both the plaintiffs. Clearly there was a reasonable suspicion on his part that both the plaintiffs had committed the offence complained of by the 1st defendant. Hence the plaintiffs' arrest was proper and lawful in the circumstances. (paras 14, 15, 16, 17, 18 & 19)

(4) The warrant of remand here was lawfully passed by the magistrate, a court of competent jurisdiction. There was no complaint from the plaintiff then about the granting of the warrant of remand. The plaintiffs neither appealed nor sought a revision of the granting of the warrant by the magistrate. Thus it was not open to the plaintiffs now to contend that the warrant of remand was wrongly granted or that it was totally unconstitutional. The plaintiffs have not shown that the procedural safeguards and legal requirements were not in place nor observed. Accordingly the plaintiffs' application was dismissed with costs. (paras 23, 25 & 29)

Case(s) referred to:

Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***

Lim Soh Meng & Anor v. Krishnan [1966] 1 LNS 89 FC ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***

Saul Hamid Pakir Mohamad v. Inspektor Abdul Fatah Abdul Rahman & Anor [2007] 5 CLJ 93 CA ***(foll)***

Shaaban & Ors v. Chong Fook Kam & Anor [1969] 1 LNS 170 PC ***(foll)***

Legislation referred to:

Criminal Procedure Code ss. 23(1)(a), 117

Evidence Act 1950, ss. 101, 102

Penal Code, s. 420

For the plaintiffs - Mandave Singh Gill; M/s K Sila Dass & Partners
For the 1st & 2nd defendants - Ganesan Karuppannan; M/s Muhammad Ganesan & Nazri
For the 3rd, 4th, 5th & 6th defendants - Wan Suhaila Mohd SFC; AG's Chambers

Reported by Susheila Sreedharan

JUDGMENT

Ahmadi Asnawi JC:

[1] In 2004 the first defendant was the manager of the second defendant. The second defendant is in the business of operating premix plants and selling premix concrete.

[2] Tan Chin Hin (hereinafter referred to as the late first plaintiff) died in 2008. He was the father of the second plaintiff who is the sole proprietor of Syarikat Lian Chen Engineering Works (LCEW). He was also the father of Tan Han Tiong who was then running Syarikat Perniagaan Hanlink (PHL).

[3] In 2004, PHL was a customer of the second defendant. The second defendant had sold 863.84 tons of premix at RM68 per ton to PHL. Subsequently PHL paid for the said premix in two cheques *vide* Maybank cheque no. 116108 for RM17,000 (hereinafter referred to as the "the first cheque") and Maybank cheque no. 096496 for RM36,000 (hereinafter referred to as "the second cheque"). The late first plaintiff was the person who passed these two cheques to the second defendant. Both these two cheques were however, dishonoured upon presentation.

[4] Upon inquiry by the first defendant, another cheque, Maybank cheque no. 070312 for the sum of RM17,000 (hereinafter referred to as "the third cheque") was subsequently given to the second defendant, also through the late first plaintiff. This cheque was issued by LCEW. This third cheque was also dishonoured with the remarks "stopped payment". Copies of the three dishonoured cheques were at pp. 2, 3 and 4 of lampiran 44.

[5] Feeling cheated, on 1 October 2004, the first defendant lodged a police report *vide* Sri Lalang Police Report number 567/04, as shown at p. 1 of lampiran 44.

[6] DW2, the third defendant commenced investigation pursuant to the said report. He arrested the late first plaintiff on 22 March 2005. Meanwhile the second plaintiff was arrested by C/Insp. Mohamad bin Taliti. Both the plaintiffs were remanded for six days thereafter and both plaintiffs were subsequently charged under s. 420 of the Penal Code in Mahkamah Magistret Kluang *vide* case no. 83-239-2005. The case is still pending.

[7] The plaintiffs are now saying that there is no basis for the first defendant to lodge the said police report and therefore the said police report is a false report and pursuant thereto their subsequent arrest and remand were baseless and therefore unlawful.

[8] Hence the plaintiffs are now seeking a declaration against all the defendants that their arrest and remand were unlawful and unconstitutional; the letter dated 25 March 2005 signed by the late 1st plaintiff at the Balai Polis (exhibited at p. 2 of lampiran 59) is null and void and that TSR Capital Bhd cannot rely on it; damages for wrongful arrest and detention; exemplary and aggravated damages; costs and interest.

Issue Of Conspiracy

[9] In para. 26 of their amended statement of claim, the plaintiffs alleged that the fourth, fifth and sixth defendants have allowed themselves to be used by the first and second defendants to exert pressure on the plaintiffs to settle a civil debt and that the third defendant, being the servant or agent of the fourth, fifth and sixth defendants had conspired with the first and second defendants and had proceeded to arrest the plaintiffs without carrying any proper investigation. The burden is squarely upon the plaintiffs to prove so. However, not *an iota* of evidence was adduced by the plaintiffs to support the allegations. It is imperative upon the plaintiffs to discharge the burden that the fourth, fifth and sixth defendants have allowed themselves to be used by the first and second defendants and that the third defendant had conspired with them (see - ss. 101 and 102 of the Evidence Act 1950; *Chandrasekaran & Ors v. PP* [1970] 1 LNS 11; *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116; *Lim Soh Meng & Anor v. Krishnan* [1966] 1 LNS 89). On account that the plaintiffs had failed to discharge the said burden, it follows through that the said allegations does not warrant any further attention.

The Issue Of Whether The First Defendant Has The Right And Basis To Lodge The Said Police Report

[10] The plaintiffs submitted that the first defendant has no right or any basis to lodge the said report and accused the second plaintiffs of cheating them. The submission was grounded upon the premise that the first and second plaintiff has no business dealing with the first and second defendants. The business transaction was purely between the first/second defendant and Tan Han Tiong of PHL and Tan Han Tiong was the main culprit. The first defendant also did not check that PHL and LCEW were separate entities with different directorships. The late first plaintiff was a bankrupt and had no position in either PHL or LCEW. He was a mere messenger between PHL/LCEW and the second defendant. Additionally the first defendant did not investigate the circumstances under which the third cheque was passed to the second defendant.

[11] It was the second plaintiff's contention that he issued the third cheque upon the request of the said Tan Han Tiong (of PHL) who had promised the second plaintiff that he will bank-in RM17,000 into the second plaintiff's bank account on or before 1 July 2004. The second plaintiff subsequently discovered that the said Tan Han Tiong had not banked-in the said sum as promised. This prompted the second plaintiff to write a letter on the Malayan Banking Berhad, Batu Pahat, on 26 July 2004 instructing the said bank to stop payment on the said third cheque, to avoid being blacklisted by the banking authorities. He had never harboured any intention to cheat the second defendant. It was thus submitted that the first defendant has no basis to lodge the said police report and to accused the second plaintiff of cheating them therein.

[12] However, it is apparent that the first defendant lodged the said police report only after the third cheque was also dishonoured. It was dishonoured even after enquiries were made in respect of the first two cheques which were dishonoured earlier. In such event it is only reasonable to expect the first defendant to question the intention of the parties or whoever it was who submitted the third cheque to the second defendant. Equally it is only reasonable for the first defendant to opine that his company was being cheated under the given circumstances. The arrangement between the said Tan Han Tiong and the second plaintiff in respect of the issuance of the third cheque is none of his business. It has nothing to do with him. Equally the fact that the second defendant has no

business dealing whatsoever with first and second plaintiffs is irrelevant. It is equally irrelevant that PHL and LCEW were separate entities. The fact not disputed is that the third cheque was a replacement of the second cheque.

[13] As the beneficiary of the said cheques, the first/second defendant had a valid expectation in law that their due through the said cheques would be paid. The undisputed fact stood out that all the three cheques given to and paid in favour of the second defendant through the late first plaintiff were dishonoured. The natural course of action for the first defendant in such circumstances is to lodge a police report as his company's rights has been transgressed. Verily there is a real basis for the first defendant to lodge the said report that his company was being cheated and on the facts it is my view that the said report is not a false report. No one can hinder the first defendant from lodging the said police report containing the said allegations upon the facts and circumstances of the case.

The Issue Of The Validity Of The Arrest

[14] Learned counsel for the plaintiff repeated the submission that there is no basis at all to arrest the plaintiffs and the said arrest by the third defendant is unlawful, illegal and capricious. Again the submission is grounded upon the premise that first defendant's report is a false report and that the plaintiffs has no business dealing with the second defendant. The main culprit was Tan Han Tiong and PHL. There was no proper investigation that the first plaintiff was a bankrupt and could not make any business dealings with the second defendant and that PHL and LCEW were separate legal entities. The second plaintiff's name was never mentioned in the police report. There were also no elements of forgery of the third cheque nor elements of theft or other forms of criminality.

[15] It is also the submission that the third defendant did not investigate that the second plaintiff stopped payment of the said third cheque because he did not want to cheat the second defendant. Additionally the dishonoured cheques clearly came under the jurisdiction of the civil courts and does not have any criminal element at all. All the more so when the third defendant admitted that the said police report was in connection with issues of outstanding sums not paid. The transaction between the plaintiffs and the first and second defendants were purely business

transactions and there was no necessity of police interference and the issuance of the cheques by the said Tan Han Tiong and the second plaintiff's were merely promises to pay and there is no criminal intent at all. Hence the arrest of both the plaintiffs were unlawful and an abuse of police power under the CPC and *ultra vires* the Federal Constitution.

[16] However in my view these are issues of evidence to be deliberated and evaluated at the criminal trial of both the plaintiffs. The forum before me is not too deliberate upon the guilt of both the plaintiffs relating to a criminal offence but to determine the propriety of the third defendant's action in arresting both the plaintiffs in the light of the allegations levelled against him.

[17] In my view, the act of the third defendant in arresting both the plaintiff's is well within the law. Section 23(1)(a) of the Criminal Procedure Code (CPC) is on his side. A reasonable suspicion that one has committed an offence is enough to trigger the arrest mechanism. The test to be applied at this stage is merely the existence of a reasonable suspicion to believe that the person has committed an offence. The standard is lower than that required to show the existence of a *prima facie* case. The Privy Council case of *Shaaban & Ors v. Chong Fook Kam & Anor* [1969] 1 LNS 170; [1969] 2 MLJ 218 gives a complete mechanism how it works. At p. 11, Lord Devlin stated:

> ... Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting-point of investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. There is first the power, which their Lordships have just

A noticed, to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police officer institutes proceedings without *prima facie* proof, he will run the risk of an action for malicious prosecution. The ordinary effect of this is
B that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under section 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed in 24 hours and there are grounds
C for believing that the accusation or information is well founded, under section 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate *prima facie* proof as a
D prerequisite for arrest ...

Further down His Lordship continued:

> There is another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence.
E Suspicion can take into account matters that could not be put in evidence at all ...

The Court of Appeal in *Saul Hamid Pakir Mohamad v. Inspektor Abdul Fatah Abdul Rahman & Anor* [2007] 5 CLJ 93 also followed the ruling in *Shaaban & Ors (supra)*. Zulkefli Makinudin JCA (as
F he then was) stated at para. (50) p. 117:

> The first defendant had arrested the plaintiff because he believed DW1's police report as reasonable. He had reasonable suspicion that the plaintiff committed the offences and arrested him. Whether
G he has reasonable cause is a question of fact for the learned trial judge to determine and in this case the learned trial judge had made a finding of fact that the arrest of the plaintiff was lawful in the circumstances of the case. The police Report No. 641/87 by DW1 is the basis of the investigation by the first defendant and as had been held in *Shaaban*'s case (*supra*) suspicion can take into
H consideration matters that could not be put in evidence at all.

[18] Adverting to the case before me the third defendant (DW2) testified that he arrested the late first plaintiff based upon the information received from Sri Lalang Police Report No. 567/04
I made by the first defendant. The report specifically mentioned the cheque numbers and amounts dishonoured and the parties involved.

He saw the complainant and requested the complainant (first defendant) to identify the late first plaintiff as the person who passed the dishonoured cheques to him. His line of investigation was centred upon the said dishonoured cheques and the persons who issued the said cheques. He opined that the case is criminal in nature as it involved elements of deception and that the offence committed is a sizeable offence under s. 420 of the Penal Code where the perpetrators could be arrested without warrant. He could not arrest the said Tan Han Hong, the person mentioned in the said police report as the said person had absconded. His investigations also revealed that the third cheque was issued by LCEW though he is not sure that the same is under the sole proprietorship of the second plaintiff. From the entirety of his testimony it is obvious that he harboured the reasonable suspicion that both the plaintiffs and the said Tan Han Hong were all involved in the issuance of the said dishonoured cheques.

[19] I could find no fault with what the third defendant did. He had acted reasonably in his actions in pursuing with his investigations and thereafter in arresting both the plaintiffs. Plainly there was a reasonable suspicion on his part that both the plaintiffs had committed the offence as complained by the first defendant. Hence I so find that the arrest of both the plaintiffs were proper and lawful in all the circumstances of the case.

[20] Additionally there is also the second plaintiff's own admission that at the time he issued the third cheque, the said sum of RM17,000 was never there in his bank account. Now, it is settled law that it is equally unlawful to issue cheques upon insufficient fund. To do so intentionally is plain deception.

[21] The third defendant next submitted the investigation papers to the public prosecutor for directions. In the hands of the public prosecutor, the reasonable suspicion harboured by the third defendant crystallized into *prima facie* evidence resulting in the prosecution of both the plaintiffs on a charge under s. 420 of the Penal Code in Mahkamah Magistret Kluang. Now, it is trite that constitutionally, the prosecution of both the plaintiffs upon the aforesaid charge is the sole business and prerogative of the public prosecutor. It has nothing to do with the police. It is preposterous to suggest that the public prosecutor acted blindly upon the recommendation of the third defendant in prosecuting both the plaintiffs without due regard to the evidence presented before him.

A **The Issue Of The Validity Of The Remand**

[22] Learned counsel for the plaintiffs submitted that the remand was wrongly sought for an alleged offence which does not come under any criminal/penal laws and that the matter in issue was civil
B in nature involving business transaction. Equally the remand order was wrongly granted without any reasons being given nor grounds being supplied and totally unconstitutional depriving the liberties of the plaintiffs.

[23] However I am of the view that the contention is without
C basis. It is trite that the granting of a warrant of remand by the magistrate is a judicial exercise fully sanctioned by law by virtue of s. 117 of the CPC. Again it is the sole discretion of the magistrate whether to grant or otherwise refuse the application for warrant of
D remand pending further investigation depending upon the sufficiency of the grounds justifying further detention under remand. Here the warrant of remand was lawfully passed by the magistrate, a court of competent jurisdiction. There was no complaint from the plaintiff then about the granting of the warrant of remand. Neither did the
E plaintiffs appeal nor sought a revision of the granting of the said warrant by the magistrate. As such it not open to the plaintiffs now to contend that the warrant of remand was wrongly sought and wrongly granted or that the said warrant of remand was totally unconstitutional.

F **[24]** Additionally there is nothing in law prohibiting the police to apply under s. 117 of the CPC for a warrant of remand to extend the detention of the plaintiffs if their investigation could not be completed within the first 24 hours of their arrest/detention. Further there is nothing in law mandating the magistrate to supply the
G grounds of granting the warrant of remand to the plaintiffs unless there is an appeal over the same. Finally the plaintiffs has not adduced any evidence to show where or how the magistrate has gone wrong in granting the said warrant of remand to warrant interference by me.

H

[25] As the said warrant of remand was lawfully passed/ordered by the magistrate, a court of competent jurisdiction, it could not be said that the said warrant of remand is wrongly granted or is totally unconstitutional in the absence of any evidence to the contrary. It
I could not be so said when it is provided by law and the procedural safeguards and legal requirements are in place and observed. Equally

the plaintiffs have not shown that the procedural safeguards and legal requirements were not in place nor observed. The burden is upon the plaintiffs to do so. I am satisfied that the plaintiff has not discharged the said burden apart from rhetoric in court.

[26] Hence I have no hesitation in dismissing learned counsel's submissions on this issue.

Declaration That The Letter Dated 25 March 2005 Signed By The Late First Plaintiff Is Null And Void And That TSR Capital Berhad Cannot Rely On The Same

[27] This letter is exhibited at p. 2 of lampiran 59 and ventilated at length in paras. 24 and 25 of the plaintiffs' amended statement of claim.

[28] However I am of the view that no evidence was adduced by the plaintiffs to support the aforesaid averments in their amended statement of claim. In fact the second plaintiff testified that he has no knowledge about the said letter nor any knowledge about the existence of the said letter. Hence it is a non issue altogether.

Decision

[29] For the reasons enumerated above I dismissed both the plaintiffs' application for the declaratory reliefs sought for on all counts with costs.